No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation to the Attorney General in 34 U.S.C. § 20913(d) (formerly 42 U.S.C. § 16913(d)) violates the constitutional nondelegation doctrine.

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BRIEF FOR PETITIONER

Petitioner Herman Avery Gundy respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit, J.A. 13, affirming petitioner's conviction, is reported at 695 Fed. Appx. 639. The district court's decision rejecting petitioner's nondelegation claim, J.A. 89-90, is unreported. A prior decision by the Second Circuit, J.A. 19, reversing the pretrial dismissal of the indictment on grounds not at issue here, is reported at 804 F.3d 140. The district court's decision to dismiss the indictment, J.A. 60, is unreported but can be found at 2013 WL 2247147.

JURISDICTION

The Second Circuit entered its judgment affirming petitioner's conviction on June 22, 2017. Petitioner filed a timely petition for a writ of certiorari on September 20, 2017, which this Court granted, limited to Question 4, on March 5, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 1, of the Constitution of the United States provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Relevant portions of the Sex Offender Registration and Notification Act are reproduced in the Appendix to this brief.

INTRODUCTION

The nondelegation doctrine, rooted in Article I, § 1, of the Constitution, prohibits Congress from transferring its legislative powers to another branch of government. This case concerns whether Congress violated that doctrine by giving the Attorney General unguided discretion to criminalize the conduct of hundreds of thousands of individuals.

The Sex Offender Registration and Notification Act ("SORNA" or "the Act") requires that any person convicted of a "sex offense"—including a local crime—register in each jurisdiction where he resides, works, or is a student. 34 U.S.C. §§ 20911(5), 20913(a).[1] SORNA also makes it a federal felony, punishable by up to ten years in prison, for someone who "is required to register under [SORNA]," to "travel[] in interstate or foreign commerce," and thereafter "knowingly fail[] to register or update a registration as required" by SORNA. 18 U.S.C. § 2250(a).

Congress did not decide whether, when, or how SORNA's registration requirements, and its related criminal penalties, apply to the more than 500,000 people convicted of a sex offense before the law's July 27, 2006 enactment. Instead, Congress delegated to the Attorney General the power to decide all issues concerning SORNA's retrospective application to these so-called pre-Act offenders. As a result, "the Act's registration requirements [did] not apply to pre-Act offenders until the Attorney General so specifie[d]." *Reynolds v. United States*, 565 U.S. 432, 445 (2012).

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[1] The Act was originally codified at 42 U.S.C. § 16901 *et seq.* and is now codified at 34 U.S.C. § 20901 *et seq.* This brief cites to the Act as currently codified.

The question in this case, expressly reserved in *Reynolds*, 565 U.S. at 441, is whether this delegation violates the constitutional separation of powers, as embodied in the nondelegation doctrine. It does. The delegation here is far more expansive and unconstrained than any the Court has upheld.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court recognized a limit on Congress's power under the Commerce Clause because of a realization that the Government's theory knew no bounds. *Id.* at 566-67. The same is true here. If the nondelegation doctrine means anything, it must mean that Congress cannot grant the Attorney General—the nation's top prosecutor—unguided discretion to compel the registration of individuals and to determine the reach of related criminal laws.

STATEMENT OF THE CASE

A. Legal background

1. *Pre-SORNA background.* Sex offender registration schemes originated with, and continue to be operated principally by, state governments acting pursuant to their police powers. Until the 1990s, sex offender registration systems were exclusively the product of state initiatives. *See, e.g.*, Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741, 746-49 (2016).

Congress entered the registration picture in 1994, when it enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub. L. No. 103–322, § 170101, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071). The statute threatened to withhold federal funds from states if they failed to adopt certain

congressionally prescribed registration requirements within three years. *Id.* § 170101(f).

The Wetterling Act applied only prospectively—that is, only to those convicted of qualifying offenses after the law's implementation. *See* Wetterling Act § 170101(a)(1), 108 Stat. at 2038; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15110, 15112 (Apr. 4, 1996) ("The [Wetterling] Act does not require states to attempt to identify and impose registration requirements on offenders who were convicted of offenses . . . prior to the establishment of a conforming registration system.").

By 1996, every state had implemented a sex offender registry. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). Nonetheless, Congress continued to enact laws requiring states to change their registration schemes or lose certain federal funds. Like the Wetterling Act, these laws operated prospectively, usually with an effective date one year in the future.[2]

2. *SORNA's registration requirements.* In 2006, Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act. SORNA's declared purpose is "to protect the public" by "establish[ing] a comprehensive national system for the registration" of

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[2] *See, e.g.*, Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345, 1345 (1996) and 62 Fed. Reg. 39009, 39019 (July 21, 1997) (requiring states to release registry information to public for certain sex offenders convicted after program established); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104–236, § 10(a), 110 Stat. 3093, 3098 (effective one year after enactment); Department of Justice Appropriations Act of 1998, Pub. L. No. 105–119, Tit. I, § 115(c)(1), 111 Stat. 2440, 2467 (additional registration requirements delayed for one year).

"sex offenders and offenders against children." 34 U.S.C. § 20901.

The Act established new federal mechanisms to support state registration schemes and to foster information sharing among jurisdictions. *See, e.g.*, 34 U.S.C. § 20921 (creating National Sex Offender Registry, which compiles state registration data); *id.* § 20925 (requiring development of software to enable jurisdictions to establish uniform registries and Internet sites); *id.* § 20941 (providing federal law enforcement resources to assist states in apprehending missing state sex offenders).

The Act also set new, more onerous baseline registration requirements for state systems. SORNA enlarged the class of offenses that subject a person to registration, 34 U.S.C. § 20911(5)(A), and for the first time mandated that juvenile offenders as young as 14 register, *id.* § 20911(8). The Act imposed more burdensome registration obligations on individuals, compelling them to register in multiple jurisdictions, *id.* § 20913(a); to report periodically in person, *id.* § 20918; and to provide additional information, including school and employment locations, DNA, finger and palm prints, vehicle descriptions, and Internet identifiers, *id.* §§ 20914, 20916.

SORNA also created a three-tier system for classifying sex offenders based on the offense of conviction (rather than based on individualized risk assessments, which many states had previously used). *See* 34 U.S.C. §§ 20911, 20915 (requiring tier I offenders, the lowest tier, to register for 15 years; tier II offenders for 25 years; and tier III offenders for life). SORNA provides no mechanism for offenders to challenge their tier classification.

As with prior federal legislation, Congress required states to comply with SORNA's provisions in order to receive certain federal funds. Congress gave the states until July 2009 to implement the law, subject to two potential one-year extensions by the Attorney General. 34 U.S.C. § 20926(a)-(b). Based on this timetable, SORNA phased out prior federal registry laws, including the Wetterling Act. *See* SORNA § 129, 120 Stat. 590, 600-01 (2006).

3. *SORNA's criminal penalties.* SORNA created—and demanded that states create—substantial criminal penalties for individuals who fail to comply with its registration requirements. First, the Act mandated that states "provide a criminal penalty that includes a maximum term that is greater than 1 year for the failure of a sex offender to comply with" SORNA's requirements. 34 U.S.C. § 20913(e).

Second, the Act made the failure to register under SORNA a federal crime in certain circumstances. The Act states in relevant part that whoever (1) "is required to register under" SORNA; (2) "travels in interstate or foreign commerce"; and (3) "knowingly fails to register or update a registration as required by" SORNA is guilty of a federal crime punishable by up to ten years in prison. 18 U.S.C. § 2250(a).

4. *SORNA's legislative history and delegation to the Attorney General.* Because SORNA placed the bulk of its administrative burden on states, the question of its retroactive application to pre-Act offenders was a "controversial issue with major policy significance and practical ramifications for states." Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 Geo. Wash. L. Rev. 993, 999-1000 (2010). Legislators estimated that this group

of pre-Act offenders included more than 500,000 people. *See* 151 Cong. Rec. H20,175 (daily ed. Sept. 14, 2005) (statement of Rep. Harris); 151 Cong. Rec. H20,193 (daily ed. Sept. 14, 2005) (statement of Rep. Emanuel).

A House of Representatives bill would have made the law applicable to pre-Act offenders. *See* H.R. 4472, 109th Cong. § 111(3) (as passed by House Mar. 8, 2006) (defining sex offender to include persons convicted "before or after the enactment" of the Act); *id.* § 113(d) (stating Attorney General "shall prescribe rules for the registration of sex offenders convicted before the enactment" of the Act). A Senate bill, however, left the question of the Act's retroactive application to the Attorney General. *See* S. 1086, 109th Cong. § 104(a)(8) (as passed by Senate, May 4, 2006).

Congress ultimately declined to resolve the issue, enacting a final version similar to the Senate bill: "Congress elected not to decide for itself whether the Act's registration requirements—and thus § 2250(a)'s criminal penalties—would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question." *Carr v. United States*, 560 U.S. 438, 466 (2010) (Alito, J., dissenting).

The final law states, in relevant part: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . ." 34 U.S.C. § 20913(d).

This grant of authority is entirely permissive: it "does not require [the Attorney General] to act at all." U.S. Br. 23, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549). Or "he could . . . wait several years before acting." *Id.* at 24. Section 20913(d) further allows the Attorney General to "change his mind at any given time or over the course of different administrations." *Id.*

The Attorney General was thus given the power to decide what Congress declined to resolve: whether SORNA would apply to pre-Act offenders at all; which pre-Act offenders would be required to register; and how SORNA's various provisions would be applied to these individuals.

5. *The Attorneys General's retroactivity decisions.* When SORNA was first passed, then-Attorney General Alberto R. Gonzales took no action. *Reynolds v. United States*, 565 U.S. 432, 443 (2012). About six months later, he issued an Interim Rule stating that SORNA requires registration of "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894 (Feb. 28, 2007).[3]

In 2008, Attorney General Michael B. Mukasey promulgated the SMART Guidelines. *See* The

[3] The Attorney General did not comply with the Administrative Procedure Act's (APA's) notice and comment procedures before issuing this rule, instead invoking the APA's "good cause" exception. *See United States v. Brewer*, 766 F.3d 884, 889 (8th Cir. 2014). The circuits "are divided over whether the Attorney General's justifications for extending SORNA to all pre-Act offenders without adhering to the requirements of the APA were sufficient." *Id.* (laying out split).

National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 (July 2, 2008). These Guidelines stated that SORNA required states to register only some, not all, pre-Act offenders. Specifically, SORNA required registration of pre-Act offenders: (i) then "incarcerated or under [probation or parole] supervision, either for the predicate sex offense or for some other crime"; (ii) "already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law"; or (iii) who later "reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense)." *Id.* at 38046.

In 2011, Attorney General Eric H. Holder, Jr. issued supplemental rules making further changes: SORNA no longer required states to register all pre-Act offenders who reenter the system—only those convicted of a new felony offense. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011).

Attorneys General have also taken different positions as to *how* SORNA applies to pre-Act offenders. For example, in the 2008 SMART Guidelines, Attorney General Mukasey addressed SORNA's durational requirements and determined that, as a default, pre-Act offenders received no credit for time previously spent in the community before SORNA was enacted. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38036. However, states were permitted to adopt a different rule to "reduce[]" the "retroactive application" of SORNA. *See id.* The Attorney General used the following example:

> SORNA § 115 requires registration for 25 years for a [tier II] sex offender . . . . A sex offender who was released from imprisonment for such an offense in 1980 is already more than 25 years out from the time of release. In such cases, a jurisdiction *may* credit the sex offender with the time elapsed . . . and does not have to require the sex offender to register . . . .

Id. at 38047 (emphasis added); *see also id.* at 38036 (stating jurisdictions had "option" to credit prior time, although "SORNA's requirements apply to all sex offenders, regardless of when they were convicted").

In the 2010 Final Rule, Attorney General Holder took the opposite position: he opined that SORNA credited pre-Act offenders with their entire prior period in the community, regardless of what a local jurisdiction might decide. The Attorney General used the same example of a tier II offender convicted in 1980, who was now freed from SORNA's requirements:

> [I]f a person was released from imprisonment in 1980 for a sex offense that places him in tier II, his SORNA registration period based on that offense ended in 2005—whether or not he was ever actually registered for the offense—and he is subject to no present registration requirement based on SORNA . . . .

Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851 (Dec. 29, 2010).

6. *States' objections and resistance to SORNA.* Following the 2007 Interim Rule, several states submitted comments to the Attorney General objecting to SORNA's retroactivity, expressing

concerns over its fairness to past offenders (especially juveniles) and noting the adverse impact that registering pre-Act offenders would have on state resources. "Almost all [the comments received] objected to the retroactive application" of SORNA. *See* Logan, *supra*, at 1002.

For example, the National Conference of State Legislatures told the Attorney General that his retroactivity decision would infringe upon "state sovereignty over the treatment of sex offenders as laid out in each state's respective sex offender registry provisions." *Id.* As the heads of six New York State agencies stated in a joint letter: "When each state first created its sex offender registry, it made a choice about how the registration requirements would be applied to previously convicted offenders. The decision on retroactive applicability raises substantial practical and policy concerns that are more appropriately addressed by the individual states." *Id.* at 1003 (quoting Letter from Denise O'Donnell et al.).

Other states similarly objected to "the increased burden associated with retroactivity." *Id.* at 1004 n.65 (citing e-mails from officials in Michigan, California, and Idaho).[4]

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[4] States also expressed more global concerns over the Attorney General's proposals. *See, e.g.*, Logan, *supra*, at 1004 (noting that Virginia objected that the "proposed regulations would be extremely cumbersome to implement and cause Virginia to devote significant resources to the collection of information which would be of limited use"); *id.* (quoting the National Conference of State Legislatures' objections that the Attorney General's proposed guidelines are a "one-size-fits all approach" that "compound the burdensome, preemptive scheme of the underlying law they seek to clarify").

As of May 2018, the Attorney General has determined that only 18 states (and four territories) have substantially implemented SORNA. *See* Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, SORNA Implementation Status, www.smart.gov/sorna-map.htm. Four of the five most populous states—California, Texas, New York, and Illinois—have not implemented the law. *See id.*

7. *Challenges to SORNA's retroactivity and delegation provision.* In the roughly 12 years since it was passed, SORNA has spawned a host of legal challenges. Among other issues, the courts of appeals divided on whether SORNA applied to pre-Act offenders of its own force or only after the Attorney General exercised his authority under Section 20913(d). *See Reynolds*, 565 U.S. at 438-39.

Some judges observed that, if SORNA did not apply to pre-Act offenders of its own force, the statute would raise a serious nondelegation issue. For example, in her concurring opinion in *United States v. Fuller*, Judge Raggi wrote that she "fail[ed] to see what guidance [SORNA] provide[s] to the Attorney General in exercising legislative authority to decide whether or not SORNA's registration requirements should apply to prior offenders at all." 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring). This would be especially problematic because it would give the Attorney General, "the very officer charged with executive power to enforce the criminal laws, the legislative power unilaterally to pronounce the scope of a law with criminal consequences." *Id.* at 511-12.

In *Reynolds*, 565 U.S. at 439, the Court nevertheless held that "the textual language" of

SORNA dictated that it did not apply of its own force to pre-Act offenders; instead Congress left the issue to the Attorney General. The Court reserved the question of whether this delegation is unconstitutional. *Id.* at 441. In dissent, Justice Scalia, joined by Justice Ginsburg, wrote that "it is not entirely clear . . . that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems . . . sailing close to the wind with regard to the principle that legislative powers are nondelegable . . . ." *Id.* at 450 (Scalia, J., dissenting).

B. Factual and procedural background

1. In 2005, before SORNA was enacted, petitioner Herman Avery Gundy entered an *Alford* plea in Maryland to Sexual Offense in the Second Degree, in violation of Maryland Criminal Law § 3-306, for the sexual assault of a minor. J.A. 25, 60. He was sentenced to 20 years in prison, with ten years suspended, and five years of probation. *Id.* At that time, Maryland had its own sex offender registration system, and petitioner's conviction obligated him to register under Maryland law. *Id.* 40.

2. In November 2010, petitioner completed the custodial portion of this state sentence and was transferred to the custody of the Federal Bureau of Prisons to serve a related federal sentence. J.A. 26. The Bureau of Prisons transferred petitioner from Maryland to a prison in Pennsylvania. *Id.* Then, in July 2012, it transferred him from Pennsylvania to a halfway house in New York for completion of his sentence. *Id.* Petitioner was released from this halfway house on August 27, 2012, and remained in

New York. *Id.* 27. He was arrested in New York in connection with this case in October 2012. *Id.* 62.

3. By indictment dated January 7, 2013, in the United States District Court for the Southern District of New York, the Government charged petitioner with violating SORNA's federal criminal provision, 18 U.S.C. § 2250(a). J.A. 45. The indictment alleged that petitioner: (1) was "an individual required to register" under SORNA based on the 2005 Maryland sex offense, (2) traveled in interstate commerce, and (3) "thereafter resided in New York without registering" as required under SORNA. *Id.*

Petitioner moved to dismiss the indictment. J.A. 3. Because his sex offense conviction predated SORNA, he argued, among other things, that the Act could not constitutionally apply to him: the nondelegation doctrine prohibited Congress from outsourcing to the Attorney General the fundamentally legislative decision about whether SORNA applies to pre-Act offenders. *Id.* 90.

The district court dismissed the indictment on unrelated grounds, J.A. 60, but the Second Circuit reversed and remanded, *id.* 20.

4. On remand, the district court rejected petitioner's nondelegation argument, declaring itself bound by the Second Circuit's decision in *United States v. Guzman*, 591 F.3d 83, 92 (2d Cir. 2010). J.A. 90. In *Guzman*, the Second Circuit acknowledged that "Congress needs to provide the delegated authority's recipient an 'intelligible principle' to guide it." *Id.* 108 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Second Circuit nonetheless held that Section 20913(d) satisfied the nondelegation doctrine because it gave the Attorney

General the power to determine SORNA's application "only with respect to the limited class of offenders who were convicted of covered sex offenses prior to SORNA's enactment." J.A. 108-09. The Second Circuit also suggested that the existence of a detailed statutory regime to govern post-Act offenders supplies an intelligible principle for deciding whether SORNA should apply to pre-Act offenders. *See id.* 108.

Petitioner and the Government proceeded to a bench trial on stipulated facts, at which petitioner was found guilty. J.A. 16. The district court sentenced him to time served and five years of supervised release. *Id.*

5. Petitioner renewed his nondelegation argument on appeal. The Second Circuit rejected this argument and affirmed. J.A. 17-18. In a single-sentence footnote, the court stated that the argument was foreclosed by its decision in *Guzman*. *Id.* 18 n.2.

SUMMARY OF ARGUMENT

This case concerns one of the Constitution's basic structural constraints on the exercise of coercive governmental power, in a context where that power impacts individual liberty in the most profound way.

The nondelegation doctrine bars Congress from abdicating its legislative function and transferring lawmaking power to another branch. Yet Section 20913(d) of SORNA grants the Attorney General undirected discretion to decide whether the more than 500,000 people convicted of sex offenses before July 2006 are subject to onerous federal registration requirements and the attendant criminal penalties for failing to register. By permitting the Attorney General to make these decisions, and to define the reach of criminal laws, the statute grants the Attorney General what can only be characterized as "legislative" powers.

The statute is thus unconstitutional under any formulation of the nondelegation doctrine. Under the original understanding of that doctrine, it is unconstitutional because it transfers to the Attorney General the authority to make generally applicable rules of private conduct, backed by criminal sanctions. Under more permissive conceptions of Congress's delegation power, Section 20913(d) is unconstitutional because it transfers rulemaking authority without setting forth a sufficiently intelligible principle—i.e., without doing the "legislative" work. The intelligible principle must include, at minimum, standards or criteria to guide and restrain the exercise of the delegated power.

But Section 20913(d) is standardless. It includes no directives to the Attorney General as to whether he should make any pre-Act offenders register; which offenders should be required to register; or even what he must (or must not) consider in deciding these questions. As the Government itself has stated, the delegation allows the Attorney General to take no action; to wait years before acting; and, if he acts, to simply reverse course at any time. His discretion is plenary. Like the statutes the Court invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), Section 20913(d) fails to provide the requisite guidance to the Executive.

Moreover, as the Court has recognized, the amount of guidance required depends on the character and importance of the delegated power. Delegations of significant power require more guidance than delegations relating to minor issues. This principle confirms the absence of sufficient guidance here: Section 20913(d) grants the Attorney General

authority to make policy decisions that bear directly on individual liberty (by determining the reach of registration requirements and criminal penalties for half a million people); disturb settled expectations of law (by deciding if SORNA imposes new registration obligations based on conduct that occurred sometimes decades earlier); and infringe states' sovereign interests (by regulating purely intrastate conduct and dictating to states, as a condition of federal funding, how they must regulate and criminalize conduct within their own borders). Yet the statute gives the Attorney General no meaningful guidance as to how to exercise these vast powers. For all of these reasons, the statute is unconstitutional.

ARGUMENT

I. The Constitution prohibits Congress from delegating its legislative powers, particularly in the criminal context.

1. The Constitution establishes a tripartite system of government that separates power among the three federal branches. Article I dictates that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. It prescribes that laws be made according to "a single, finely wrought and exhaustively considered, procedure," including bicameralism and presentment. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (invalidating Line Item Veto Act because President cannot change or "effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7").

The nondelegation doctrine protects the constitutional separation of powers and lawmaking

procedure by prohibiting Congress from delegating its legislative powers and thereby circumventing this carefully crafted scheme. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405-06 (1928). The doctrine protects individual liberty, promotes democratic accountability, and preserves federalism.

a. *Individual liberty.* The nondelegation doctrine, like the separation of powers more generally, "diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Framers understood that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty.").

b. *Deliberative lawmaking and democratic accountability.* The nondelegation doctrine also fosters a particular form of lawmaking and democratic accountability. "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberate lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). Both deliberation and responsiveness are key: the Constitution's specific, structured lawmaking process promotes the regularity and stability that the rule of

law requires, while Congress's representative nature ensures broad participation in lawmaking.

Moreover, prohibiting Congress from delegating its lawmaking function ensures that citizens can readily identify the source of laws, thereby preventing government actors from "wield[ing] power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

c. *States' interests.* Finally, the nondelegation doctrine helps preserve state sovereignty. Within our constitutional framework, states maintain their sovereign interests, in part, through their representatives' participation in the federal legislature, particularly the Senate. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985). "[T]he structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting); *see generally* Herbert Wechsler, *The Political Safeguards of Federalism*, 54 Colum. L. Rev. 543 (1954).

2. Because of its focus on protecting individual liberty, the nondelegation doctrine is enforced most rigorously in the criminal context.[5] The Framers

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[5] Several specific constitutional provisions safeguard the separation of powers in the criminal context. While Congress may single out parties to a civil suit, *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 (2016), the Bill of Attainder Clause, U.S. Const. art. I, § 9, prevents Congress from singling out persons for criminal punishment. This protection is "an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by

recognized that, with "criminal subjects," Congress should "leave as little as possible to the discretion of those who are to apply and to execute the law." James Madison, *The Report of 1800*, *in* 14 *The Papers of James Madison* 266, 307, 324 (Robert A. Rutland et al. eds., 1983). As a result, the Court has made clear that "defining crimes" is a "legislative" function, *United States v. Evans*, 333 U.S. 483, 486 (1948), and that Congress cannot delegate "the inherently legislative task" of determining what conduct "should be punished as crimes." *United States v. Kozminski*, 487 U.S. 931, 949 (1988); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("It is the legislature . . . which is to define a crime, and ordain its punishment.").

This special prohibition on congressional delegation of criminal lawmaking power is reflected in the Court's void-for-vagueness doctrine. Vague criminal statutes are prohibited both because individuals are entitled to sufficient notice as to what constitutes a crime and to prevent legislatures from "abdicat[ing] their responsibilities for setting the standards of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (vague laws "impermissibly delegate[] basic policy matters to

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legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965). Similarly, while Congress may impose retroactive civil liability, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), the Ex Post Facto Clause, U.S. Const. art. I, § 9, circumscribes the ability of Congress to criminalize behavior retrospectively. In this way, the Clause "upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981).

policemen"); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (invalidating vague criminal statute as delegation to define crimes). "In that sense, the [void-for-vagueness] doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Because the Constitution forbids the legislature from transferring the power to define crimes, the Court has also withheld deference under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984), for agencies' interpretations of criminal statutes. *Chevron* deference is premised on the theory that statutory ambiguity is an implicit delegation from Congress to the agency to resolve the ambiguity. *Id.* at 844. The Court's refusal to grant *Chevron* deference in the criminal context reflects the Court's repeated admonition that Congress, not the Executive, must specify the terms of criminal laws. *See, e.g., Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014) (rejecting agency interpretation of criminal statute as irrelevant because "criminal laws are for courts, not for the Government, to construe"); *United States v. Apel*, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference.").

3. While concerns about the separation of powers reach their apex in the criminal context, they are reduced when considering shared, or non-Article I, powers. "It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). But Congress "may certainly," *id.* at 43, transfer "non-legislative powers which Congress

could exercise" itself, *United States v. Grimaud*, 220 U.S. 506, 517 (1911); *accord Dimaya*, 138 S. Ct. at 1248 (Thomas, J., dissenting) ("Congress does not 'delegate' when it merely authorizes the Executive Branch to exercise a power that it already has.").

Thus, for example, Congress has broad authority to assign to the President matters within the Executive Branch's traditional domain, including matters relating to foreign affairs and the military. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936); *Loving v. United States*, 517 U.S. 748, 772-73 (1996). Congress and the Executive have also historically shared the authority to grant patents or to administer other public franchises and public lands. *See, e.g., Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C.*, 138 S. Ct. 1365, 1373-74 (2018). Congressional assignments in these contexts do not violate the nondelegation doctrine because they are not delegations of exclusively "legislative" powers.

4. The Court has not "exactly drawn" the line separating "legislative" from executive or judicial powers, *see Wayman*, 23 U.S. (10 Wheat.) at 42-43, but one thing is clear: the power to enact generally applicable, binding rules of private conduct is "legislative." *See Yakus v. United States*, 321 U.S. 414, 424 (1944); *see also The Federalist No. 75*, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society."). As the Court stated in *Yakus*, "[t]he essentials of the legislative function are the determination of the legislative policy and its . . . promulgation as a defined and binding rule of conduct." 321 U.S. at 424; *see also Mistretta*, 488 U.S.

at 396 (upholding delegation where Congress did not transfer the authority to make rules that "bind or regulate the primary conduct of the public"); *Grimaud*, 220 U.S. at 516 (congressional grant of power to Executive to regulate national forests conferred "administrative functions" rather than "legislative power," because the forestry regulations "do not declare general rules with reference to rights of persons and property, nor do they create or regulate obligations and liabilities").

II. Section 20913(d) of SORNA violates the nondelegation doctrine.

Section 20913(d) violates the Constitution under any formulation of the nondelegation doctrine. First, the delegation is invalid under an originalist understanding of the nondelegation doctrine because the statute transfers to the Attorney General what can only be described as legislative authority. Second, the statute is unconstitutional because it fails to provide a sufficiently intelligible principle to cabin and direct the Attorney General's exercise of the delegated powers. The significance and character of those powers call for substantial, meaningful congressional guidance in the statute, but Section 20913(d) provides the Executive no guidance whatsoever.

A. Section 20913(d) impermissibly delegates quintessentially "legislative" powers.

1. Section 20913(d) of SORNA grants the Attorney General quintessentially legislative powers: it allows him to prescribe rules, backed by criminal sanctions, governing the conduct of roughly half a million private individuals, including petitioner.

This delegation grants the Attorney General authority to decide if individuals like petitioner must submit to government registration and to set the terms and duration of that registration. It affects the substantive liberty interests of these individuals in the most profound way.

SORNA also empowers the Attorney General to determine the reach of both federal and state criminal laws. First, by allowing the Attorney General to decide which, if any, pre-Act offenders are "required to register" under SORNA, Congress has delegated to the Attorney General the authority to define, and determine the scope of, the elements of SORNA's new federal criminal offense. *See* 18 U.S.C. § 2250(a) (first element of offense is being "required to register under the Sex Offender Registration and Notification Act" and third element is "knowingly fail[ing] to register or update a registration as required by [SORNA]"); *see also Carr v. United States*, 560 U.S. 438, 446-47 (2010) (holding that first element is triggered only by a requirement to register under SORNA, not by the underlying sex offense conviction). The Attorney General is thus empowered to decide unilaterally whether a pre-Act offender's conduct—failing to register under SORNA—can be a federal crime.

Second, the Act effectively allows the Attorney General to determine the scope of new state crimes. As a condition of federal funding, SORNA commands states to adopt felony penalties for offenders who fail to register as required under the Act. *See* 34 U.S.C. § 20913(e). Because Section 20913(d) gives the Attorney General the authority to decide which pre-Act state offenders, if any, must register under SORNA, the statute effectively empowers the

Attorney General to determine the reach of these new state criminal laws.

The exercise of these broad powers over individuals is lawmaking in the most basic sense. Accordingly, the statute confers on the Attorney General powers that can only be described as "legislative."

2. Under an originalist interpretation of the Constitution, the legislative nature of these delegated powers ends the inquiry and requires this Court to invalidate the delegation. *See, e.g., Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring) ("[T]he original understanding of the federal legislative power . . . require[s] that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative. . . . [Those powers] must be entirely regulated by the legislature itself."); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

B. SORNA's delegation to the Attorney General fails the intelligible principle test.

In addition to violating originalist constitutional principles governing delegations of power, Section 20913(d) fails the Court's prevailing "intelligible principle" test.

1. To state an intelligible principle, a statute must provide sufficiently clear guidance on fundamental policy questions.

a. While affirming that Congress cannot delegate its legislative powers, the Court has recognized that "separation-of-powers principle[s] . . . do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The Court's modern jurisprudence has been "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.*

The Court developed the "intelligible principle" test to evaluate such congressional delegations of power. Under this test, if "Congress shall lay down by legislative act an intelligible principle to which the person or body [to whom power is delegated] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

When Congress lays down a sufficiently clear guiding principle, the Court has construed the powers delegated not to be "legislative," even if they involve some degree of discretion, because Congress itself has made all of the fundamental policy decisions—i.e., it has done the "legislative" work. *See J.W. Hampton, Jr., & Co.*, 276 U.S. at 407. As the Court explained in *J.W. Hampton, Jr. & Co.*, when Congress delegates pursuant to an "intelligible principle" it "is not an

exact statement" to claim that the Executive is exercising "legislative power" because such "power has already been exercised legislatively by the body vested with that power." *Id.*; *accord Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("[T]he legislative power of Congress cannot be delegated . . . . But Congress may declare its will, and, after fixing a primary standard, devolve . . . the 'power to fill up the details' . . . .").

b. In addition to being clear enough to guide the Executive, this intelligible principle must enable courts to determine whether the delegate has acted within the bounds of the delegated authority and in accordance with Congress's expressed will. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 423, 425 (1944) (courts must be able to see "in an appropriate proceeding" that there is a "substantial basis" for the executive action and that the "will of Congress has been obeyed"); *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (intelligible principle requirement "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards").

The intelligible principle requirement thus preserves "both sets of constitutional checks—judicial and political—on the exercise of coercive authority in a 'government of laws.'" Laurence H. Tribe, *American Constitutional Law* 985 (3d ed. 2000). It permits a court to police delegations to ensure the delegate does not exceed Congress's grant of authority and follows Congress's will. And by requiring Congress to provide adequate guidance in the first instance, the intelligible

principle test ensures that Congress itself makes the critical legislative policy decisions.

c. Under the intelligible principle test, the amount of required congressional guidance depends on the "extent and character" of the power conferred. *See J.W. Hampton, Jr., & Co.*, 276 U.S. at 406; *see also Whitman*, 531 U.S. at 475 ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Congress itself must regulate certain "important subjects," but may more freely delegate to the executive in areas of "less interest." *Wayman*, 23 U.S. (10 Wheat.) at 43. Thus, while Congress "must provide substantial guidance on setting air standards that affect the entire national economy," far less guidance is necessary when the Executive determines relatively minor matters, like the definition of "country elevators." *Whitman*, 531 U.S. at 475.

Congress must speak with particular clarity when it confers powers that "touch[] constitutionally sensitive areas." Tribe, *supra*, at 987. "[A]ction . . . in areas of doubtful constitutionality[] requires careful and purposeful consideration by those responsible for enacting and implementing our laws." *Greene v. McElroy*, 360 U.S. 474, 507 (1959); *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("If . . . 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317 (2000) (noting that the nondelegation doctrine's "most convincing claim" is "that certain highly sensitive decisions should be made by Congress").

When transferring powers that touch upon these areas, Congress must provide sufficiently clear

directives to show that it deliberated and made the required "legislative judgment." *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) ("The area of permissible indefiniteness [of a delegation] narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights"); *see also Bilski v. Kappos*, 561 U.S. 593, 649 (2010) (Stevens, J., concurring) ("[A]t the 'fringes of congressional power,' 'more is required of legislatures than a vague delegation to be filled in later[.]'") (quoting *Barenblatt v. United States*, 360 U.S. 109, 139-40 (1959) (Black, J., dissenting)).

This principle is of course manifest in the requirement that Congress—not the Executive—decide the scope of criminal laws, as discussed above in Section I.2.

It is also reflected in the need for Congress to speak with specificity regarding whether a law should apply retroactively—another sensitive, significant decision that requires legislative deliberation and accountability. Retroactivity "is not favored in the law," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), because retroactive statutes "sweep away settled expectations" "without individualized consideration," and impede rule-of-law values. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). The Court thus looks for Congress to clearly state that a law is retroactive, or clearly authorize the Executive to order retroactivity. *See, e.g.*, *Bowen*, 488 U.S. at 207-15 (invaliding retroactive rule because delegation did not clearly require retroactivity). This ensures that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268.

Congress must also provide clear guidance for laws that impinge upon state sovereignty or otherwise disturb the traditional federal-state balance of power. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (requiring plain statement so that court can be "absolutely certain" Congress intended to interfere with state selection of judges). This is a corollary to the general presumption against federal preemption in areas traditionally regulated by the states. *See, e.g., California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

2. Given the character and significance of the power conferred by Section 20913(d), and the absence of guidance, this delegation is unconstitutional.

In light of the need for Congress to provide more "substantial guidance" when delegating in important areas, *Whitman*, 531 U.S. at 475, Section 20913(d) is unconstitutional. The delegation here gives the Attorney General the power to define the reach of both federal and state criminal laws. It empowers the Attorney General to decide whether the Act applies retroactively, allowing him to impose requirements that upset individuals' settled expectations and, in some cases, disturb final court judgments issued under pre-SORNA laws. It also purports to allow the Attorney General to regulate the purely intrastate conduct of pre-Act offenders, infringing a traditional area of state sovereignty.

In other words, the delegation involves exactly the sort of significant and constitutionally sensitive decisions that require careful legislative deliberation and especially clear legislative guidance. But this statute provides the Attorney General with no guidance with respect to pre-Act offenders.

a. Section 20913(d) states in relevant part: "The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter [SORNA] to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders . . . ." 34 U.S.C. § 20913(d).

SORNA does not tell an Attorney General whether, when, or how she should expand the statute to cover pre-Act offenders. Nor does the statute identify any criteria an Attorney General should (or should not) consider in making her decisions. Should she require the registration of all offenders even if their convictions are 15, 20, or 30 years old? Should she consider factors other than the age of conviction in making this decision? Should she consider the logistical and financial burdens on states that must register these offenders? The statute is silent.

The Government itself has acknowledged the astounding breadth of this delegation. In *Reynolds*, the Government explained that, pursuant to Section 20913(d), an Attorney General "could do nothing at all" with respect to applying SORNA to pre-Act offenders. U.S. Br. 2, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549). He could wait several years before acting. *Id.* Even once he took some position, he "could change his mind at any given time or over the course of different administrations." *Id.* And the Attorney General could require pre-Act offenders to "comply with some but not all of the registration requirements." *Id.*; *see also* Tr. of Oral Arg. 31, *Reynolds v. United States*, 565 U.S. 432 (2012) (No. 10-6549) (Government describing delegation as "quite broad" and "plenary").

In *Reynolds*, the Court accepted this understanding of the statute. It held that Section 20913(d) must be read "as conferring the authority to *apply*" SORNA to pre-Act offenders and that the "registration requirements do not apply until the Attorney General so specifies." *Reynolds*, 565 U.S. at 440, 445. The Court also acknowledged that the statute contemplates the possibility of "different federal registration treatment of different categories of pre-Act offenders." *Id.* at 440-41.

Nor are these descriptions of the unconstrained nature of this delegation merely hypothetical. The various actions of Attorneys General under Section 20913(d) reveal the sort of unguided policy making—and policy reversals—that are the hallmark of the exercise of unfettered discretion.

In 2006, the Attorney General took no position as to which pre-Act offenders, if any, were required to register under SORNA, meaning that none were. Then, in February 2007, he issued the Interim Rule stating that *all* pre-Act offenders were required to register under SORNA. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. 8849, 8897 (Feb. 28, 2007). But in 2008, a different Attorney General reversed course—stating in the SMART Guidelines that SORNA required states to register only *some* pre-Act offenders. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (July 2, 2008). Then, in 2011, the law changed again: another Attorney General issued supplemental guidelines altering which pre-Act offenders SORNA required to register. *See* Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1635 (Jan. 11, 2011).

The Attorneys General's policies as to *how* SORNA applies to pre-Act offenders have also changed. SORNA sets durational registration requirements for post-Act offenders, based on the offense of conviction. *See* 34 U.S.C. § 20915 (setting terms between 15 years and life). One question for many pre-Act offenders is how these durational requirements apply to them. For instance, if someone has been released since 1980, and would only be required to register for 25 years under SORNA, does SORNA require her registration for another 25 years starting from its 2006 enactment—or has she already completed her term?

The lack of statutory guidance on this question is apparent from the Attorneys General's changing policies. In 2008, the Attorney General decided that the default was to give no credit for the time offenders previously resided in the community. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38036, 38047 (July 2, 2008). But then, in 2010, this policy changed: the Attorney General stated he would fully credit prior time in the community, meaning that if a person had already been in the community for the relevant period set forth in Section 20915, SORNA did not require her to register at all. *See* Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81851 (Dec. 21, 2010).

The point is not that the Attorneys General's various pronouncements regarding pre-Act offenders represent good or bad policy. Nor is it that these repeated policy reversals are necessarily arbitrary. The point is that the Constitution requires Congress—not the Attorney General—to make these sorts of fundamental legislative choices and for Congress's

choices to be reflected in the guidance it provides in any delegation. That the Attorneys General have taken such different positions underscores that Section 20913(d) provides no guidance at all.

b. The lack of guidance attending this delegation makes Section 20913(d) akin to the statutes the Court invalidated in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Both cases involved laws backed by criminal sanctions, and that fact, coupled with the overall significance of the delegated authority, weighed in the Court's holdings that Congress had not sufficiently constrained Executive power in its delegations. *See Fahey v. Mallonee*, 332 U.S. 245, 249 (1947) (distinguishing *Panama Refining* and *Schechter Poultry* because they "dealt with delegation of a power to make federal crimes of acts that never had been such before").

In *Panama Refining*, 293 U.S. at 406, the Court struck down a statutory provision "authoriz[ing] [the President] to prohibit the transportation in interstate and foreign commerce of petroleum" products produced in excess of state production quotas, so-called "hot oil." The Court noted that whether oil could be transported in interstate commerce was "obviously [a question] of legislative policy." *Id.* at 415. It therefore looked to the statute to see whether Congress had properly "set up a standard for the President's action; [or] . . . required any finding by the President in the exercise of the authority to enact the prohibition." *Id.*

The statute did not do so. It did not state "whether or in what circumstances or under what conditions" the President was to ban hot oil, nor provide any

criteria to govern his decision. *Panama Refining*, 293 U.S. at 415. The statute instead endowed the President with "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit," unguided by any "standard or rule." *Id.* at 415, 418. Thus, "[i]nstead of performing its lawmaking function," Congress had "transfer[red] that function to the President." *Id.* at 430.

Similarly, in *Schechter Poultry*, 295 U.S. at 529, the Court struck down a statute authorizing the President to adopt a code of industrial conduct that fostered "fair competition." The Court held that "[i]n view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes . . . is virtually unfettered." *Id.* at 541-42. It invalidated Congress's attempt to "abdicate or transfer to others the essential legislative functions with which it is vested." *Id.* at 529.

As in those cases, Section 20913(d) delegates power to the Executive with no standards to guide him. It does not require the Attorney General to make any factual findings before acting. It gives him the power to lay down registration requirements for pre-Act offenders, or not, as he may see fit.

c. The dearth of guidance in Section 20913(d) stands in marked contrast to statutes where the Court has upheld congressional delegations to the Executive in the criminal lawmaking context.

In *Touby v. United States*, 500 U.S. 160, 168-69 (1991), for example, the Court ruled that Congress had provided sufficient guidance in permitting the Attorney General to temporarily schedule, and thereby criminalize the possession or distribution of,

new drugs under the Controlled Substances Act (CSA). Before exercising this power, Congress required the Attorney General to find that scheduling a new drug was "necessary to avoid an imminent hazard to the public safety." *Id.* at 163 (citing 21 U.S.C. § 811(h)). In making that determination, Congress further required the Attorney General to consider three factors: the drug's "history and current patterns of abuse"; "[t]he scope, duration and significance of abuse"; and "[w]hat, if any, risk there is to the public health." *Id.* at 166 (citing 21 U.S.C. §§ 811(c)(4)-(6), 811(h)(3)). Congress also made clear that the Attorney General needed to make a panoply of other specific findings. *Id.* at 166-67 (citing § 202(b), 21 U.S.C. § 812(b)).

The Court determined that even if "greater congressional specificity [regarding a delegation] is required in the criminal context," the detailed directives in the CSA satisfied these requirements because they "meaningfully constrain[ed]" the Attorney General's discretion. *Touby*, 500 U.S. at 166. Indeed, the statute at issue in *Touby* resembles some of the earliest delegations approved by the Court, which conditioned executive action on the making of specific factual findings. *See, e.g.*, *Field v. Clark*, 143 U.S. 649, 693 (1892) (holding President was not "making laws" where delegation required him to act if he found a particular fact).

Those delegations are completely unlike Section 20913(d), which does not require the Attorney General to make any factual findings before applying SORNA to pre-Act offenders. It does not tell him the factors to consider in his decision. It does not constrain his discretion at all.

d. The fact that SORNA grants the Attorney General unguided discretion to decide the scope of criminal laws is one important reason for the Court to strike down the delegation. But it is not the only reason. SORNA's delegation touches on other constitutionally sensitive areas, permitting the Attorney General to impose new legal obligations based on past conduct and to intrude on traditional areas of state sovereignty. This underscores the need for substantial and especially clear legislative guidance to accompany the delegation. Because that guidance is utterly lacking, these are additional reasons for the Court to hold Section 20913(d) unconstitutional.

1. *Retroactivity.* The delegation in Section 20913(d) allows the Attorney General to apply SORNA's registration requirements to persons based on conduct that occurred before—sometimes decades before—the statute's enactment. It empowers the Attorney General, not Congress, to decide whether and how the Act applies to these individuals. Assuming Congress can delegate to the Attorney General the power to impose these more burdensome federal registration requirements on pre-Act offenders, Congress must provide particularly clear guidance as to whether and under what conditions the requirements should be imposed retroactively.[6] Yet

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[6] This Court has not yet determined whether SORNA violates the ex post facto prohibition, *see Carr v. United States*, 560 U.S. 438, 442 (2010), though it upheld Alaska's registration system against an ex post facto challenge, *Smith v. Doe*, 538 U.S. 84, 105-06 (2003). SORNA is significantly more onerous than the registration system sanctioned in *Smith*. *See, e.g.*, Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal*

the delegation here provides no "express terms," *Bowen*, 488 U.S. at 209—indeed, no terms at all—to guide the Attorney General's retroactivity decision.

2. *State sovereignty*. The delegation here also demands unambiguous congressional guidance because it allows the Attorney General to make rules that infringe state sovereign interests.

Sex Offender Registration and Notification Act Raises New Constitutional Questions, 46 Harv. J. Legis. 369, 386 (2009) (noting that the "differences between SORNA and the Alaska statute are so significant" that "§ 2250(a) should be struck down on the grounds reviewed in *Smith*").

At a minimum, action in this area of "doubtful constitutionality" demands purposeful consideration by Congress itself. *See Greene v. McElroy*, 360 U.S. 474, 507 (1959). Several state supreme courts have distinguished *Smith* to hold that retroactive application of their state registration and notification laws violate state (or federal) ex post facto prohibitions. *See Commonwealth v. Muniz*, 164 A.3d 1189, 1218, 1222-23 (Pa. 2017) (Pennsylvania registration scheme violates both state and federal constitutions); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (same regarding Maine scheme); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (New Hampshire scheme violates state constitution); *Starkey v. Okla. Dep't of Corrections*, 305 P.3d 1004, 1030 (Okla. 2013) (same regarding Oklahoma scheme); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 143 (Md. 2013) (same regarding Maryland scheme); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (same regarding Indiana scheme); *Doe v. State*, 189 P.3d 999, 1019 (Ala. 2008) (application of Alaskan registration scheme to pre-Act offenders violates state constitution, despite ruling in *Smith*). The Sixth Circuit has held that retroactive application of Michigan's registration law violates the federal ex post facto prohibition. *Does v. Snyder*, 834 F.3d 696, 705-06 (6th Cir. 2016); *cf. Millard v. Rankin*, 265 F. Supp. 3d 1211, 1232-34 (D. Colo. 2017) (enforcement of Colorado's registration law against those with old convictions violates Eighth and Fourteenth Amendments).

SORNA contemplates that states will retain primary responsibility for registering and monitoring state sex offenders. *See Carr v. United States*, 560 U.S. 438, 452 (2010). The retroactive application of SORNA's more expansive registration requirements posed significant logistical burdens on states. *See supra* at 11-12. It also ran contrary to states' policy choices about how to regulate affairs within their own borders. *See id.*

Even if states decline to implement SORNA, the Attorney General has stated that SORNA requires pre-Act state sex offenders to register as required by the Act. *See* 28 C.F.R. § 72.3; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007) ("SORNA directly imposes registration obligations on sex offenders as a matter of federal law . . . ."); *id.* ("In contrast to SORNA's provision of a three-year grace period for jurisdictions to implement its requirements, SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral . . . ."); Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81850 (Dec. 29, 2010) (same); The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38031 (July 2, 2008) (same).

In other words, even if a state has not implemented SORNA and even if state registration laws (or court judgments) do not require a state sex offender to register, SORNA imposes a freestanding federal registration requirement on these individuals. *See, e.g., United States v. Paul*, 718 Fed. Appx. 360, 363 (6th Cir. 2017) (upholding a Section 2250 conviction of a pre-Act state sex offender whose state judgment exempted him from state registration

because "SORNA imposes a distinct federal duty that [the defendant's] Tennessee judgment could not and did not release"); *United States v. Pendleton*, 636 F.3d 78, 83, 85-86 (3d Cir. 2011) (upholding a Section 2250 conviction based on defendant's failure to update registration when he moved to Delaware, even though he was not required to register under Delaware law).

This is a significant intrusion on state sovereign interests and the traditional authority of states to regulate conduct within their own borders. Even assuming Congress has the power to encroach upon state interests in this fashion,[7] these are the sorts of policies that must be debated and made in Congress—where the states are represented and can participate more meaningfully in policymaking. Congress may not delegate constitutionally delicate policymaking power to another entity absent clear, meaningful guidance indicating that Congress itself has deliberated on the

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[7] Congress has no general police power to regulate purely intrastate, non-economic activity, including intrastate criminal activity. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2086 (2014); *United States v. Kebodeaux*, 570 U.S. 387, 402-03 (2013) (Roberts, C.J., concurring). Thus, Congress likely lacks authority to require state sex offenders to register under SORNA, as Section 20913 requires. Unlike SORNA's federal criminal provision (18 U.S.C. § 2250), the registration provision contains no reference to interstate commerce or other basis for the exercise of federal power. If Congress itself lacks the power to require state sex offenders to register under SORNA, this would invalidate the delegation to the Attorney General in Section 20913(d). *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Congress cannot grant to an officer under its control what it does not possess."); Tribe, *supra*, at 980-81 ("Because Congress can give away only what is its to give, the most obvious limits on legislative delegation are those on all legislation: the constitutional prohibition on federal legislative action [] not affirmatively authorized by the Constitution . . . .").

costs and benefits of different policies, and considered the effects on the states. Section 20913(d) lacks such guidance.

3. Section 20913(d) is unconstitutional under any formulation of the intelligible principle test.

a. Even if the Court puts aside the particular subject matter of this delegation, Section 20913(d) would still be unconstitutional. Under the most permissive formulation of the intelligible principle test, the Court has required that Congress provide clear guidance on fundamental policy questions. To do this, Congress must specify, at a minimum, its legislative objective and criteria or standards to guide and cabin the exercise of the delegated power, or otherwise "prescribe[] the method of achieving that objective." *Yakus v. United States*, 321 U.S. 414, 423 (1944).

For example, in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), a section of the Clean Air Act directed the Environmental Protection Agency to promulgate ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health." *Id.* at 465 (quoting 42 U.S.C. § 7409(a)). The statute directed the EPA to use "technical 'criteria' documents," reflecting the latest scientific knowledge, "to identify the maximum airborne concentration of a pollutant that the public health can tolerate, decrease the concentration" for an "adequate" margin of safety, and set the standard there. *Id.* at 465, 473.

The Court held that the terms of that delegation—both the specific policy objective and the clearly articulated standards to guide the decision-maker—

adequately constrained the EPA's discretion. *Id.* at 465-68. The act defined a sufficiently specific goal (air quality standards "requisite" to "protect the public health" with an "adequate margin of safety"). *Id.* And the statute told the EPA what to consider, and what not to consider, to achieve that goal. *Id.* The statute was specific enough for the Court to rule that the delegation gave the EPA no authority to consider cost in setting air quality standards. *Id.* at 465-72.

b. Here, in contrast, SORNA contains no goal specifically relating to the delegation; no criteria to constrain the Attorney General's exercise of the delegated power; and no standards by which a court can evaluate any executive action. Section 20913(d) instead grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time.

One way to see the difference between Section 20913(d) and valid delegations, like that upheld in *Whitman*, is to consider the absence of standards for a court to apply in reviewing the Attorney General's actions. In *Whitman*, the Court could look to the statute to determine if the EPA was complying with Congress's will and to see which actions were within the terms of the delegation. *See Whitman*, 531 U.S. at 465-75; *see also Yakus*, 321 U.S. at 423, 425 (explaining that intelligible principle allows reviewing courts to determine whether there is a "substantial basis" for executive action and whether the "will of Congress has been obeyed").

A court is unable to conduct a similar analysis with respect to Section 20913(d). Because the

provision states no policy objective and lists no criteria or standards for the agent to consider, it is impossible to determine whether the Attorneys General's various actions—doing nothing, requiring all pre-Act offenders to register, requiring only certain pre-Act offenders to register, and so on—comply with congressional will. This proves the absence of an intelligible principle guiding this delegation.

4. The courts of appeals have not persuasively identified an intelligible principle in Section 20913(d).

a. Nor have the courts of appeals considering this delegation persuasively identified any principle limiting the Attorney General's discretion. As a preliminary matter, the Second Circuit downplayed the need for legislative guidance by claiming that Congress gave the Attorney General "only" the authority to "determine whether or not SORNA applies" to pre-Act offenders and, if so, to decide "how they might comply" with the statute. J.A. 109. Because pre-Act offenders constitute "a limited class of individuals," the Second Circuit concluded, the authority Section 20913(d) confers is "highly circumscribed." J.A. 108.

This analysis is flawed. First, "[a] delegation of authority to determine the potential criminal exposure of half a million people cannot be deemed narrow." *United States v. Fuller*, 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring); *see also id.* at 505 & n.2 (majority opinion) (describing "sole authority to determine SORNA's criminal reach" as an "expansive and profound power" and "awesome authority"). Second, the Second Circuit's approach confuses the need for meaningful statutory guidance with the

question of how many people a delegation affects. Congress cannot cede its lawmaking power to another branch just because that power concerns a discrete group. If that were the case, Congress could assign to the Attorney General the power to issue binding rules of conduct for the entire population of Wyoming, because the roughly half-million people who live there constitute only a "limited class of individuals."

Similarly, under the Second Circuit's logic, Congress would have been free to make the delegation in *Panama Refining*, because the rules concerned only the trafficking of "hot oil." Yet the Court there held that, even though "the act to be performed [by the Executive was] definite and single," the delegation was still invalid because "the necessity, time, and occasion of the performance ha[d] been left in the end to the discretion of the delegate." *Schechter Poultry*, 295 U.S. at 551 (Cardozo, J., concurring) (describing *Panama Refining*).

b. The question is not whether a class of more than 500,000 people is "limited," but whether Congress provided a sufficiently intelligible principle to ensure that the Attorney General is executing Congress's will, not her own. On that question, the Second Circuit and other courts of appeals have suggested that the mere existence of a detailed statutory regime to govern post-Act offenders supplies an intelligible principle for deciding whether SORNA should apply to pre-Act offenders. *See* J.A. 108; *see also United States v. Cooper*, 750 F.3d 263, 272 (3d Cir. 2014); *United States v. Ambert*, 561 F.3d 1202, 1214 (11th Cir. 2009).

This is wrong because the Attorney General was given plenary authority to decide whether SORNA's requirements even apply to pre-Act offenders. And if

the Attorney General decides to compel pre-Act offenders to register, there is no statutory directive that she apply the same terms to pre-Act offenders as to post-Act offenders (or even apply the same terms to all pre-Act offenders). *See Reynolds v. United States*, 565 U.S. 432, 440 (2012) (delegation appears to permit "different federal registration treatment of different categories of pre-Act offenders"). Accordingly, rather than cabining the Attorney General's discretion, Congress's explicit guidance for post-Act offenders starkly exposes the Attorney General's wholly unchecked power to devise a pre-Act regime and prosecute anyone who violates it. *See United States v. Nichols*, 784 F.3d 666, 675 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of reh'g en banc).

c. Courts of appeals besides the Second Circuit have also sought an intelligible principle in SORNA's prefatory declaration of purpose, which states that the Act seeks to establish a "comprehensive national system for the registration of [sex] offenders" in order "to protect the public," 34 U.S.C. § 20901. *See, e.g.*, *United States v. Nichols*, 775 F.3d 1225, 1231-32 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113 (2016); *Cooper*, 750 F.3d at 271-72; *United States v. Goodwin*, 717 F.3d 511, 516-17 (7th Cir. 2013); *Ambert*, 561 F.3d at 1213-14.

According to these courts, this declaration of purpose shows that Congress meant to "provide the broadest possible protection to the public" and that the Attorney General was therefore instructed to require the registration of pre-Act offenders "to the extent that he determines it would contribute to the protection of the public and the comprehensiveness of a national sex offender registry." *Ambert*, 561 F.3d at 1214. This reasoning does not withstand scrutiny.

i. First, the Court has held that a general declaration of statutory purpose, unmoored from the specific powers being delegated, is not sufficient to state an intelligible principle. In *Panama Refining*, for example, the Court rejected the argument that vague statements of statutory purpose, unconnected to the particular legislative delegation at issue, were sufficient. The statute in *Panama Refining*, like SORNA, had an introductory statement expounding the general purposes of the legislation. *Panama Refining*, 203 U.S. at 416-17. However, the Court ruled that this was not sufficient to state an intelligible principle: "[T]his broad outline is simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections." *Id.* at 417-18.

SORNA's general statement of purpose is likewise located in the Act's preface; it is not tied to—and does not refer to—the specific question of how the Attorney General should treat pre-Act offenders. *See* 34 U.S.C. § 20901.

Moreover, if Congress had made a particular policy choice with respect to pre-Act offenders—for example, if it wanted SORNA to apply to all pre-Act offenders—it easily could have said so. SORNA itself contains other provisions that make specific and clear delegations to the Attorney General. *See, e.g.*, 34 U.S.C. § 20916(a) ("The Attorney General . . . shall require that each sex offender provide . . . those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act."). Thus, Congress knew how to direct the Attorney General when it wanted to. Congress's failure to provide any guidance regarding pre-Act offenders suggests that Congress simply

declined to make the hard policy choices about those offenders, and instead passed them to the Attorney General.

ii. Even if a freestanding general statement of purpose could be enough in some circumstances to provide an intelligible principle, SORNA's statement of purpose does not do so here.

First, the phrase "comprehensive national system," 34 U.S.C. § 20901, likely referenced SORNA's holistic approach to the administration and enforcement of registration requirements, not some unstated desire to extend the statute to cover some or all pre-Act offenders. Through its various provisions, SORNA established a new federal system to facilitate the enforcement of jurisdictions' registration schemes and the sharing of registration information. *See, e.g.*, *id.* § 20921 (creating the National Sex Offender Registry compiling state data); *id.* § 20925 (commanding the Attorney General, in consultation with states, to develop software to enable jurisdictions to establish uniform registries and Internet sites); *id.* § 20941 (providing federal law enforcement resources to assist states in locating and apprehending missing state sex offenders). These provisions comprise the "comprehensive national system" contemplated by Congress; it is not clear how Congress felt about the registration of pre-Act offenders merely because it sought to establish a more comprehensive overall system for future registration.

This Court has also repeatedly and consistently rejected the contention that SORNA's general, overall purpose necessarily means that Congress intended the statute to cover as many offenders as possible in every situation (or otherwise controls the meaning of later

specific provisions). *See Nichols*, 136 S. Ct. at 1118-19 (rejecting Government's argument that SORNA's purpose means it must be interpreted to cover offenders who move abroad); *Reynolds*, 565 U.S. at 442 (rejecting Government's argument that SORNA's purpose means the statute must be construed to cover pre-Act offenders of its own force); *Carr v. United States*, 560 U.S. 438, 443, 454-57 (2010) (rejecting Government's argument that SORNA's purpose requires construing its criminal provision to cover offenders who traveled interstate before the Act's effective date). These decisions affirm that SORNA's general declaration of purpose does not control the interpretation of its particular statutory provisions. In the same way, it does not provide a discernable restriction on the Attorney General's power.

Congress's goal of "protect[ing] the public," 34 U.S.C. § 20901, is also not enough to provide an intelligible principle. After all, every criminal statute is designed to protect the public in some way. If that ubiquitous purpose were enough to provide an intelligible principle, Congress could simply transfer to the Attorney General the authority to decide the coverage of every criminal statute. The Founders rejected such a notion. As James Madison explained: "If nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—it would follow that the whole power of legislation might be transferred by the legislature from itself . . . ." James Madison, *Madison's Report on the Virginia Resolutions (1800), in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 560 (J. Elliot ed., 1836).

Finally, even if Congress's wish to protect people via a "comprehensive national system" encompassed some unexpressed desire to register a large number of pre-Act offenders, it would still leave unanswered the key policy question: how "comprehensive" is comprehensive enough?[8] And at what cost? Congress certainly did not want *all* sex offenders to have to register indefinitely, as the fixed, finite registration periods for post-Act offenders demonstrate. *See* 34 U.S.C. § 20915. But Congress did not offer any guidance as to how the Attorney General should balance this potential desire for expansive coverage against other important policy concerns, such as the burden retroactivity imposes on states.

As the Court recognized when it construed the Comprehensive Criminal Control Act of 1984, "no legislation pursues its purposes at all costs": "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective *is the very essence of legislative choice*—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (first emphasis added).

SORNA is replete with examples of compromises with respect to the registration of post-Act offenders, including the exemption of certain offenders and

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[8] For instance, to be "comprehensive," does SORNA require a tier II offender released in 1980 to register for another 25 years after SORNA's 2006 enactment, as one Attorney General decided? Or is SORNA still "comprehensive" if that offender is freed from SORNA's registration requirements altogether, as a different Attorney General later decided? That there is no answer shows that the statute's general declaration of purpose does not suffice as an "intelligible principle."

limited registration periods for some. The existence of these compromises shows that Congress did not intend SORNA's registration requirements to apply to every sex offender "always and in every particular without exception or at any cost." *See Nichols*, 784 F.3d at 675 (Gorsuch, J., dissenting from denial of reh'g en banc) (collecting examples). Yet the statute delegates the weighing of the various values at stake—the "very essence of legislative choice"—without any guidance.

* * *

The power to decide if more than half a million individuals are subject to government registration, on penalty of prison, is an immense one. The Constitution vests that power exclusively in Congress. But in Section 20913(d) of SORNA, Congress improperly transferred this legislative power to the Attorney General without telling him how, or even whether, to exercise it. The nondelegation doctrine thus requires the Court to invalidate this statute. Doing so will reaffirm basic separation-of-powers principles, thereby protecting liberty, preserving democratic accountability, and vindicating the rule of law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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May 25, 2018

APPENDIX

United States Code Title 18
Crimes and Criminal Procedure
Part I. Crimes
Chapter 109B. Sex Offender and Crimes Against Children Registry

18 U.S.C. § 2250. Failure to register

Effective: February 8, 2016

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) International travel reporting violations.-- Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.);

(2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and

(3) engages or attempts to engage in the intended travel in foreign commerce;

shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Affirmative defense.–In a prosecution for a violation under subsection (a) or (b), it is an affirmative defense that–

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(d) Crime of violence.–

(1) In general.–An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) Additional punishment.–The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a) or (b).

Title 34. Crime Control and Law Enforcement
Subtitle II. Protection of Children and Other Persons
Chapter 209. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification

Effective: September 1, 2017

* * *

34 U.S.C. § 20901. Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders . . . .

* * *

34 U.S.C. § 20911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender:

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves--

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means–

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section

115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 20912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated

sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

* * *

34 U.S.C. § 20913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b)

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

* * *

34 U.S.C. § 20914. Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.

(8) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

(c) Time and manner

A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General.

34 U.S.C. § 20915. Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is–

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by–

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

In the case of--

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of--

(A) a tier I sex offender, the reduction is 5 years;

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

* * *

34 U.S.C. § 20916. Direction to the Attorney General

(a) Requirement that sex offenders provide certain Internet related information to sex offender registries

The Attorney General, using the authority provided in section 114(a)(7) of the Sex Offender Registration and Notification Act, shall require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act. These records of Internet

identifiers shall be subject to the Privacy Act (5 U.S.C. 552a) to the same extent as the other records in the National Sex Offender Registry.

(b) Timeliness of reporting of information

The Attorney General, using the authority provided in section 112(b) of the Sex Offender Registration and Notification Act, shall specify the time and manner for keeping current information required to be provided under this section.

(c) Nondisclosure to general public

The Attorney General, using the authority provided in section 118(b)(4) of the Sex Offender Registration and Notification Act, shall exempt from disclosure all information provided by a sex offender under subsection (a).

(d) Notice to sex offenders of new requirements

The Attorney General shall ensure that procedures are in place to notify each sex offender of changes in requirements that apply to that sex offender as a result of the implementation of this section.

(e) Definitions

(1) Of "social networking website"

As used in this Act, the term "social networking website"–

(A) means an Internet website–

(i) that allows users, through the creation of web pages or profiles or by other means, to provide information about themselves that is available to the public or to other users; and

(ii) that offers a mechanism for communication with other users where such users are likely to include a substantial number of minors; and

(iii) whose primary purpose is to facilitate online social interactions; and

(B) includes any contractors or agents used by the website to act on behalf of the website in carrying out the purposes of this Act.

(2) Of "Internet identifiers"

As used in this Act, the term "Internet identifiers" means electronic mail addresses and other designations used for self-identification or routing in Internet communication or posting.

(3) Other terms

A term defined for the purposes of the Sex Offender Registration and Notification Act has the same meaning in this Act.

* * *

34 U.S.C. § 20918. Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than–

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

* * *

34 U.S.C. § 20921. National Sex Offender Registry

(a) Internet

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) Electronic forwarding

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

* * *

34 U.S.C. § 20925. Development and availability of registry management and website software

(a) Duty to develop and support

The Attorney General shall, in consultation with the jurisdictions, develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites.

(b) Criteria

The software should facilitate–

(1) immediate exchange of information among jurisdictions;

(2) public access over the Internet to appropriate information, including the number of registered sex offenders in each jurisdiction on a current basis;

(3) full compliance with the requirements of this subchapter; and

(4) communication of information to community notification program participants as required under section 20923 of this title.

(c) Deadline

The Attorney General shall make the first complete edition of this software available to jurisdictions within 2 years of July 27, 2006.

* * *

34 U.S.C. § 20926. Period for implementation by jurisdictions

(a) Deadline

Each jurisdiction shall implement this subchapter before the later of--
(1) 3 years after July 27, 2006; and
(2) 1 year after the date on which the software described in section 20925 of this title is available.

(b) Extensions

The Attorney General may authorize up to two 1-year extensions of the deadline.

* * *

34 U.S.C. § 20927. Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

* * *

34 U.S.C. § 20941. Federal assistance with respect to violations of registration requirements

(a) In general

The Attorney General shall use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of Title 28, a sex offender who violates a sex offender registration requirement shall be deemed a fugitive.

(b) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 2007 through 2009 to implement this section.

* * *